Literature Review

Pretrial Court Diversion of People with Mental Illness

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Abstract

Court diversion is a method of administering justice compassionately for persons with mental illness (PMI). Evidence-based practices of this intervention were identified by reviewing the existing literature. Findings suggest that: (a) formal case finding procedures are important for the early identification of mentally ill offenders in need of services, (b) stable housing enhances the possibility that the divertee will remain in regular contact with her or his treatment provider, and (c) active case management improves compliance and reduces the likelihood of recidivism. In summary, research has not yet yielded generalizable knowledge about diversion and thus, it is suggested that evaluations should involve well-defined indicators, benchmarks, and outcomes.

Introduction

Diversion from the criminal justice system for persons with mental illness (PMI) can occur at three junctures: (a) pre-arrest diversion, in which police use their discretion not to lay a charge; (b) court diversion, when charges have been laid but diversion into treatment occurs pretrial; and (c) mental health court, when diversion occurs postplea.[1] This paper focuses on court diversion which is intended to address perceived shortcomings of the traditional court system. As several commentators have observed, the deinstitutionalization of PMI—a trend informed both by therapeutic and economic arguments—has effectively criminalized mental illness, leading to increased contact of PMI with the law.[2,3] This increased contact leads to higher arrest rates than the general population,[4] and PMI are arrested and jailed.[2] Furthermore, many arrests are for

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nuisance offenses such as public disturbances or minor property offenses.[5,6] The following comments from police officers in London, Ontario, illustrate these concerns.

> Over the years, I've seen the same person arrested and brought to a secure facility down in our cells. Sometimes with charges, sometimes not. Sometimes, they've been brought in because the trespass to property act is being used, just to do something because we can't leave them in the location where they're causing problems.
> It's just such a waste, and we're really not serving these people and we're not serving the community through charging them. It's a waste of money and it's a waste of resources that could be better used elsewhere.
> We are not stopping the problem. We're just putting a very quick Band-Aid solution on it. By arresting that person, criminalizing them, just to remedy the situation on the street. Yes, they're committing the offense, the arrests are lawful, but they are not the correct course of action.[7]

Furthermore, advocates of court diversion argue that regular courts often fail to identify and address the therapeutic needs of PMI who have been charged and/or arrested.[8] Court diversion programs, on the other hand, generally involve the decision not to prosecute eligible offenses if a charged offender with mental illness agrees to treatment. Such programs are known as postbooking, pretrial schemes.[1] The purpose of this paper is to identify evidence-based practices in court diversion programs for PMI through a literature review focusing solely on mental illness (co-occurring/concurrent disorders were excluded from this review by the mandate from the funding agency, the Ontario Ministry of Health and Long-Term Care).

Court Diversion and Criminalization

The increasing prevalence of court diversion may be explained, in part, by the criminalization of PMI. The term "criminalization" was first used in relation to mental illness by Abramson.[9] In this classic formulation, the term refers to a social dilemma posed by the deinstitutionalization of PMI: "If the entry of persons exhibiting mentally disordered behavior into the mental health system of social control is impeded, community pressure will force them into the criminal justice system of social control." [9(p. 103)]

In effect, Abramson argues that the criminal justice system reinstitutionalizes PMI by subjecting them to criminal prosecution for relatively minor offenses. Indeed, as a result of complex structural changes to the delivery of mental health care—predicated both on fiscal necessity and a philosophical inclination toward deinstitutionalization—community-based care is now a preferred treatment modality for most PMI.[10,11]

In Canada, the current round of deinstitutionalization began in earnest in the mid 1990s when, as Sealy and Whitehead[12] point out, average days of care in psychiatric hospitals and psychiatric units in general hospitals began to decrease, primarily due to bed closures. The movement of PMI out of hospitals and into the community led to their growth in the community without adequate supports.[12] Appelbaum[3] notes a number of factors responsible for a similar situation in the US. These include: declining reimbursements for psychiatric services as a result of behavioral managed care, cutbacks to Medicare payments, and reduced spending on mental health units associated with hospitals. The criminalization of PMI, therefore, is at least partly understood as an unintended consequence of deinstitutionalization and inadequate community-based treatment. More formally, three factors are thought to contribute to the criminalization of mental illness: (a) increased numbers of persons with PMI residing in the community, (b) police handling of PMI, and (c) PMI being unable to gain access to treatment.

The public profile of all forms of mental health diversion in the criminal justice system was advanced markedly by the *Criminal Justice/Mental Health Consensus Project*[8] conducted in 1999 by the US Council of State Governments in response to the requests from state government

officials for recommendations to improve the criminal justice system's response to PMI. The resulting *Consensus Project Report* contains examples of programs, policies, or elements of state statutes that illustrate one or more jurisdiction's attempts to implement a particular policy statement. However, although the *Consensus Project* is a milestone in mental health diversion, the report does not advocate a particular replicable model for court diversion programs.[8] In Ontario, the Crown Practice Memorandum Manual for Diversion of Mentally Disordered/Developmentally Disabled Offenders[13] specifies that when the accused suffers from a mental illness that the Crown Prosecutor believes is the underlying cause of the criminal conduct, the accused is seen as a suitable candidate for diversion. Usually, violent crime renders the offender ineligible for diversion. In Ontario, diversion is offered mainly for Class-I offenses; these may include joy riding, theft, or fraud under $5,000 in damages. Diversion may also be offered for Class-II offenses—such as uttering threats, public mischief, and break and enter—in which there are extenuating circumstances not involving violence. An accused with a criminal record or who was previously diverted is not automatically precluded from diversion. As in California's formal diversion program, if the accused completes the diversion program, the criminal charges are dismissed.[14]

Methods

To identify evidence-based practices in court diversion programs for PMI from the peer-reviewed scholarly literature, free-text searches of databases such as *Web of Science*, *Medline*, *PubMed*, and *PsychInfo*, among others, were conducted. Extensive searches of the Internet for electronically published documents and for references to unpublished items were also conducted. Relevant documents were retrieved from Web sites associated with universities, advocacy groups, information clearinghouses, and all levels of government, as well as existing pre-arrest programs throughout North America, Great Britain, and Australasia. Ultimately, 145 articles related to court diversion were retrieved.

The retrieved articles were assigned to a panel of 13 investigators who were researchers and practitioners in the fields of police services, criminal justice, and mental health, and who were family members of PMI; the articles were assigned for review on the basis of each investigator's particular expertise. The investigators assessed the literature for strengths and weaknesses using a standardized literature appraisal tool containing research methods, the number and measures of data, the author's findings, and any conceptual or methodological problems.

Results

While most court diversion programs tend to consist of the same general procedures, they may vary enormously in terms of staff and resources. For example, the diversion team for a pilot program associated with the Adelaide Magistrates Court in Australia consisted of a coordinator with a background in mental health and disability issues, a clinical psychologist who oversaw assessments, and a mental health liaison officer responsible for advising mental health service providers.[15,16] In Ontario, however, diversion teams in smaller or rural communities may consist of a single psychiatric nurse.[17]

Unfortunately, little is known of the long-term outcomes of court diversion programs. Few studies follow up and evaluate the outcomes of diversion of adult offenders with mental illness. The findings from the most relevant studies are summarized in Table 1. In selecting articles for inclusion in this table, studies were included that: (a) dealt exclusively with court diversion of PMI but not with co-occurring substance abuse disorders, (b) had clearly defined process or outcome measures, and, (c) while not necessarily generalizable, nevertheless offered findings

Table 1
Key court diversion studies

Study	Method	Measures	Conclusion
Swaminath et al.[17]	Investigators collected data from pretrial diversion assessments conducted in court (n=114)	Process measure: criteria for diversion in rural and urban settings; Outcome measure: recidivism	Urban county offered diversion more often to persons with psychoses, mood disorders, and minor offenses. Rural county offered diversion most to persons accused of serious offenses. Recidivism rates after a year of supervised care was 2–3%, respectively. Authors conclude that pretrial diversion of PMI is feasible for both urban and rural settings
Chung et al.[20]	Offenders (n=65) were interviewed concerning their treatment 6 months after diversion	Outcome measures: contact with police; help-seeking from mental health professionals, probation officers, social workers, psychiatric nurses, and voluntary agencies	Fifty-four (83%) had not reported contact with police; 55 (85%) reported seeking help from the specified services

Chung et al.[18]	Offenders (n=22) were interviewed concerning their treatment one year after diversion	Outcome measure: quality of life measured by Life Experiences Checklist (LEC)	LEC scores lower for PMI at 6 months and 1 year after diversion than standardized urban samples
Steadman et al. [22]	Interviews with diverted PMI (n=80)	Process measures: study identified the characteristics of persons diverted through court-based program in one Midwestern city	Two factors important in decision to divert: (1) community risk and (2) availability of specialized programs for diverted offenders. Age, sex, clinical, and social context variables appear to influence diversion decisions
Lamb et al.[14]	Records of PMI charged with misdemeanors and referred to a clinical psychologist court consultant were studied (n=96)	Outcome measures: poor outcome defined as occurrence of one or more of four events during the follow-up postdiversion year: psychiatric hospitalization, arrest, significant physical violence against persons, and homelessness	Fifty-six defendants (58%) were mandated to receive judicially monitored mental health treatment, and 33 (59%) had a good 1-year outcome

likely to be helpful to court diversion programs in other communities. After excluding purely descriptive accounts and nonempirical policy-oriented papers, five studies met these criteria.

It is difficult to gauge the overall effectiveness of court diversion programs due to jurisdictional/regional variations in treatment and resources, and to varying conceptualizations of "effectiveness", which preclude the meaningful comparison of study findings. Notwithstanding terminological confusion, such evaluative literature as exists tends to focus on the following process and outcome variables: recidivism, compliance, monitoring/case management, and treatment/community services.

One study[18] supports the proposition that stable accommodation enhances the possibility that the divertee will remain in regular contact with her or his treatment provider. The study found that only 9 of the 22 PMI they studied 6 months and 1 year after diversion had homes to return to, which may account for the low rate of contact with health professionals. Only 8 of the 22, for example, consulted a psychiatrist during the period of the study. Additionally, lawyers or court workers may be reluctant to apply for the diversion option if a program or treatment is unavailable (i.e., inadequate housing stock in the community).

While it seems reasonable that extended mental health treatment with active case management would improve compliance and reduce the likelihood of recidivism, the court-diversion literature is sparse. Lamb et al.[14] noted that case managers perform critical functions, including client identification and outreach, evaluation, direct consultation to the courts, and the development of an appropriate treatment plan, among others. An equally important function, however, is that of monitoring the client's treatment to determine whether services are in place and whether the client is compliant.

Some studies[14,17,19,20] of diversion programs note difficulties in creating awareness of the diversion option among lawyers and court staff, who may not be aware of mental health issues.[19] Swaminath et al.[17] found that some lawyers were not conversant with the diversion procedure or found it cumbersome. In other studies,[20] the application to divert was made by professional staff who were knowledgeable about mental health issues. Lamb et al.[14] suggest that it is crucial for nonclinicians in the criminal justice system to have training in recognizing mental illness.

Additionally, formal case finding procedures are important for the early identification of mentally ill offenders in need of services. In the US, some court diversion workers are able to make rapid and regular use of both mental health and criminal justice information systems to learn more about an individual's history.[1] While similar links between criminal justice and mental health information systems may not be practicable in all jurisdictions, some accounts of diversion programs suggest that, at minimum, program staff check daily rosters of jail and remand inmates to find clients, interview them, recommend diversion if appropriate, and link them to mental health treatment.[22]

Conclusions

Existing studies on court diversion lack: (a) control groups (even studies with focus groups need to use a "control" condition), (b) longitudinal designs to assess long-term outcomes, and (c) objective data on key variables to allow comparisons across studies/countries. If a comprehensive understanding of these programs is to emerge, their implementation needs to be tied to a replicable method of evaluation involving commonly agreed-upon indicators, benchmarks, and outcomes. Only with such data can randomized controlled trials assess whether the financial resources spent on diversion programs are justifiable in terms of their effect on PMI.

Implications for Behavioral Health

The long-term outcomes of court diversion are vastly understudied. The preponderance of literature consists of program descriptions or evaluations whose focus on outcomes is limited

primarily to the collection of descriptive statistics regarding program enrolment and completion. With the exception of some studies noted above, neither has there been much effort to gauge the effect of diversion on recidivism or on quality of life nor has there been much systematic effort to delineate factors that contribute to successful diversion. Despite this, the literature on pretrial court diversion tends to support the following:

- Some studies of court diversion programs note difficulties in creating awareness of the pretrial diversion option among lawyers and court staff, who may not be aware of mental health issues.[17,21]
- Formal case finding procedures are important for the early identification of mentally ill offenders in need of services.[1,21]
- Stable housing enhances the possibility that the divertee will remain in regular contact with her or his treatment provider.[14,20]
- Active case management improves compliance and reduces the likelihood of recidivism.[17,18]

Agreement on the identification and definition of diversion program outcomes is to be recommended; in the literature, a wide variety of outcomes have been used: (a) recidivism; (b) treatment compliance; (c) treatment effectiveness; (d) independent living skills; (e) rehospitalization; (f) housing/homelessness; (g) community integration; (h) co-occurring disorders, such as alcohol and drug addiction; (i) incarceration rates; (j) quality of life; and (k) symptomatology. As this literature review suggests, there is value in reaching consensus that is reached on standard indicators and outcomes so that meaningful comparison of outcomes across settings becomes possible and benchmarks can be established.

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